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**Fedex Home Delivery, an Operating Division of Fedex Ground Package Systems, Inc. *and* International Brotherhood of Teamsters, Local Union No. 671.**
Cases 34–CA–012735, 34–RC–002205

March 16, 2015

ORDER DENYING MOTION

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA, JOHNSON, AND MCFERRAN

On September 30, 2014, the National Labor Relations Board issued a Decision and Order in this proceeding, finding that the Respondent's Hartford drivers were employees within the meaning of Section 2(3) of the Act and that the Respondent thus violated Section 8(a)(5) and (1) by refusing to recognize and bargain with the Union that represents them. 361 NLRB No. 55 (2014). The Respondent has moved for reconsideration of these findings.

We deny the Respondent's motion. The Respondent argues why it disagrees with the Board's decision, but has not identified any material error or demonstrated extraordinary circumstances warranting reconsideration under Section 102.48(d)(1) of the Board's Rules and Regulations. Nonetheless, we address the Board's retroactive application of its refined independent-contractor standard in the underlying decision.

The Board's customary practice is to apply new policies and standards "to all pending cases in whatever stage."[1] Accordingly, the Board applies a new rule to the parties in the case in which the rule is announced so long as doing so would not work a "manifest injustice."[2] In determining whether the retroactive application of a Board decision will cause manifest injustice, the Board balances three factors: (1) the reliance of the parties on preexisting law; (2) the effect of retroactivity on accomplishment of the purposes of the Act; and (3) any particular injustice arising from retroactive application.[3]

Here, we find that the Board properly applied its refined standard in the underlying decision. Regarding the first factor, the Board's approach in *FedEx* did not represent a marked departure from well-settled precedent. As fully explained in that decision, the Board reaffirmed its longstanding "all incidents of the relationship" approach to evaluating independent-contractor status, guided by the nonexhaustive common-law factors enumerated in the Restatement (Second) of Agency Section 220 (1958).[4] Although the Board also introduced a new independent-business factor to its analysis, the Board made clear that this factor "encompasses considerations that the Board has examined in previous cases."[5] Thus, even assuming that the Respondent had relied on preexisting precedent in structuring its driver program, the considerations that the Board evaluated in *FedEx* were substantially similar to those that the Board had assessed in prior decisions.[6]

Regarding the second factor, we find that retroactivity aided in accomplishing the purposes of the Act by clarifying the Board's independent-contractor standard[7] and by illustrating how that standard is to be applied in future decisions.

Finally, regarding the third factor, we do not find, and the Respondent does not assert, that any particular injustice arose from retroactive application of the refined standard in the underlying decision. Indeed, all of the factors that the Board analyzed in the decision were litigated exhaustively in the hearing, and it is difficult to conceive of anything that the Respondent might have done differently if this policy had been in effect before then.[8]

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[1] *Aramark School Services*, 337 NLRB 1063, 1063 fn. 1 (2002) (quoting *Deluxe Metal Furniture Co.*, 121 NLRB 995, 1006–1007 (1958)).

[2] *Pattern Makers (Michigan Model Mfrs.)*, 310 NLRB 929, 931 (1993).

[3] *Machinists Local 2777 (L-3 Communications)*, 355 NLRB 1062, 1069 fn. 37 (2010).

[4] 361 NLRB No. 55 slip op. at 1.

[5] Id. slip op. at 11–12.

[6] In its motion, the Respondent also contends that the Board in this case was bound to apply the U.S. Court of Appeals of the District of Columbia Circuit's decision in *FedEx Home Delivery v. NLRB*, 563 F.3d 492 (2009), in which the court found FedEx Home Delivery drivers at another facility to be independent contractors. The Respondent argues that, because the record in that earlier case was made part of the record in this case, the court's decision should have been applied here as the law of the case. We disagree. In the underlying decision, the Board expressly declined to consider evidence regarding practices at FedEx facilities not at issue in this case. The fact that such evidence was made part of the record did not effectively merge this case with the one decided by the court. In any event, the Board declined to adopt the court's analysis in that decision.

[7] 361 NLRB No. 55 slip op. at 11.

[8] The Respondent contends that the Board violated its due process rights by faulting the Respondent for failing, in its offer of proof, to include information about "the circumstances of each [route] sale or whether any profit was realized by the drivers," which the Respondent asserts was a new proof requirement. But the Board had considered the same type of evidence in previous decisions. See *Roadway Package System III*, 326 NLRB 842, 853 (1998). Indeed, the Respondent elicited testimony on these very topics during the hearing. In any event, the Board explained in *FedEx* that such evidence would not "change the fact that all of these sales would have been made pursuant to the terms imposed by the Respondent . . . For the same reason, system-wide evidence of route sales would not weigh significantly in favor of independent-contractor status." 3 61 NLRB No. 55 slip op. at 15 fn. 66.

Accordingly, we find that the Board's application of its refined standard in the underlying decision and others currently pending, consistent with our usual practice, would not cause manifest injustice.

IT IS ORDERED, therefore, that the Respondent's motion for reconsideration is denied.[9]

Dated, Washington, D.C. March 16, 2015

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Harry I. Johnson, III, Member

Lauren McFerran, Member

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[9] Member Johnson vigorously adheres to the views expressed in his dissenting opinion in the underlying decision. A fortiori, he would not apply the majority's new independent contractor standard retroactively. However, he agrees that there are no grounds for granting the Respondent's motion for reconsideration.